No. 81-2169

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHERT, Officer;
THOMAS TRUMBLE, Officer;
STANLEY GARBER, Officer,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 24, 1982.
CERTIORARI GRANTED OCTOBER 12, 1982

JOINT APPENDIX

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1983 Form

Instructions for Filing Complaint by Prisoners under the Civil Rights Act, 42 U.S.C. § 1983 and the Jurisdictional Statue 28 U.S.C. § 1343(3)

This packet includes four copies of a complaint form and two copies of a forma pauperis petition. To start an action you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. *All copies of the complaint must be identical to the original.*

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. The plaintiff or plaintiffs must sign and swear to the complaint. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is neces-

sary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

In order for this complaint to be filed, it must be accompanied by the filing fee of $15. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to preceed in forma pauperis. Two blank petitions for this purpose are included in this packet. One copy should be filed with your complaint; the other copy is for your records. After filling in the petition, you must have it notarized by a notary public or other officer authorized to administer an oath.

You will note that you are required to give FACTS. You need not make legal arguments or give citations to cases or statutes.

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the Eastern District of Virginia.

1983 Form

FORM TO BE USED BY PRISONERS IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 AND 28 U.S.C. § 1343(3)

In the United States District Court For Eastern District of Virginia

JOHN FRANKLIN PROSISE
[Enter above the full name of the plaintiff or plaintiffs in this action.]

v.

(1) LT. GILBERT A. HARING
(2) DET. HENRY W. ALLEN
(3) DET. J. R. BADEY
(4) OFFICER ALVIN BEUCHART
(5) OFFICER THOMAS TRUMBLE
(6) OFFICER GARBER
[Enter above the full name of the defendant or defendants in this action.]

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes [ ] No [X]

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the addi-

tional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

   Plaintiffs: NONE

   Defendants: NONE

2. Court [if federal court, name the district; if state court, name the county]: NONE

3. Docket number:

4. Name of judge to whom case was assigned:

5. Disposition [for example: Was the case dismissed? Was it appealed? Is it still pending?]:

6. Approximate date of filing lawsuit:

7. Approximate date of disposition:

II. Place of Present Confinement: ARLINGTON DETENTION CNT.
RM #500
1400 N. COURTHOUSE RD. ARL., VA. 22201

III. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of plaintiff JOHN F. PROSISE RM #500

Address 1400 N. COURTHOUSE RD. ARL., VA. 22201

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant GILBERT A. HARING is employed as A LIEUTENANT at ARL. CO. POLICE DEPT. ARL., VA.

C. Additional Defendants: HENRY W. ALLEN - DETECTIVE - ARL. CO. POLICE DEPT. ARL., VA. J. R. BADEY - DETECTIVE - ARL. CO. POLICE DEPT. ARL., VA. ALVIN BEUCHART - OFFICER - ARL. CO. POLICE DEPT. ARL., VA. THOMAS TRUMBLE - OFFICER - ARL. CO. POLICE DEPT. ARL., VA. ? GARBER - OFFICER - ARL. CO. POLICE DEPT. ARL., VA.

IV. Statement of Claim

State here as briefly as possible the FACTS of your case. Describe how each defendant is

involved. Include also the names of other persons involved, dates, and places. You need not make any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary.)

On Sept. 7, 1977, at approxamently 8 to 9 PM., I went to my apartment with my fiance, Kathy I. Denny (now my wife) My apt. was located at 224 N. Glebe Rd. Arl., Va. (apt. #4) - We had gotten into an argument, and she got one of my pistols and was threatening me with it. I had gotten my other pistol, for I was scared she would shoot me. Then she got a granny fork from the kitchen, and stabbed me in the left forearm with it. I then called the Arl. Co. Police Dept. I was hoping after I called the police, she would get scared and put down the pistol. She didn't. The police then showed up outside; looking around for someone stabbed. She then yelled out the window that I had a gun and was trying to shoot her. I yelled out that it was her who was trying to shoot me. The police asked if they came up, would I open the door. I said yes. My fiance was then looking out the window, and I grabbed for

her gun. She struggeled for a few seconds trying to keep a hold of the pistol. In the process, both guns, simultaneously went off. One bullit went straight into the floor, one into the ceiling. The police then tried to kick in the door. I yelled that I would open it, don't kick it in. I then opened the door, with both pistols in my left hand, arm stretched out in the opposite direction from the door. There were 3 police officers standing there with pistols pointed at me. Officer Trumble then pushed his way into my apt. and jabbed me with the barrel of his pistol in my right side, telling me to drop the guns. I told him I would, but quit jabbing me with his pistol. I also told him it was my apt., my guns legally registered to me. My left arm was still pointed in the opposite direction from the police. Trumble then jabbed me real hard with his pistol, and grabbed my left arm, making the pistols fall. He threw me towards a couch, at the same time Officer Beuchart hit me with his pistol butt in the head. They handcuffed me and started to take me outside. I told them I didn't want to go. Then said your under arrest, I said okay, but it was against my will. After outside, I asked what I was under arrest for. They said, "we'll think of some-

thing by the time we get to the station". No rights were read that I can remember. I went to the station and demanded to be taken to the hospital. They took me.

After getting out on bond and going home, I found a search warrant there that gave false information. Also, I found out from the search warrant that I had been set up. There was some chemicals in the closet, in boxes. On the search warrant it said they were in the living room. Also, later on, I found out the factory seals had been broken on some of the bottles of chemicals, and some of the chemicals in them disposed of to make them look used. Detectives Allen and Badey, executed the search warrant and confiscated the chemicals.

Charges against Police

(1) Police Brutality - Beuchart, Trumble

(A) Beuchart hit me with pistol butt in head.

(B) Trumble hitting (jabbing) me with pistol and threw me down.

(2) Excessive Force - Beuchart, Trumble, Haring.

(A) Beuchart hit me with pistol. Also had it drawn.

(B) Trumble jabbing me with pistol, threw me down. Also had pistol drawn.

(C) Haring had pistol drawn.

(3) Felonius Assault - Beuchart.

(A) Beuchart hit me hard enough with pistol butt to fracture my cheek bone.

(4) Aiding and Abeting - Beuchart, Trumble, Haring.

(A) All three aided and abeted each other on the first 3 charges.

(5) Abduction - Beuchart, Trumble, Haring.

(A) Each one aided in the abduction, for they had no warrant or probable cause for arrest. I told them that I did not want to be taken from my apt. They said, "lets go, your under arrest". I said okay, but its against my will. Mentally, not physically. I knew if I did not go, they would beat me up more. I was afraid for my life for the reason of them allready beating me up.

(6) Forceable Entry - Beuchart, Trumble, Haring.

(A) Upon opening my door to talk to police, they pushed their way into my apt. against my will.

(7) Trespassing - Beuchart, Trumble, Haring.

(A) Upon opening my door to talk to police, they pushed their way into my apt. against my will.

(8) Illegal Arrest - Beuchart, Trumble, Haring.

(A) No probable cause for arrest, or a warrant for arrest.

(9) Failure to advise of rights - Beuchart, Trumble, Haring.

(A) Failed to read rights at time of arrest.

(10) Illegal Search and Seizure - Beuchart, Allen, Badey.

(A) Beuchart took what he thought to be a suspected drug, out of a shirt in the bedroom closet without a warrant.

(B) Allen and Badey illegally seized chemicals. They were not written down on the search warrant. Also, searched apt. and moved chemicals so they would be in plain sight, before getting the search warrant.

(11) Conspiracy - Beuchart, Trumble, Haring, Allen, Badey, Garber.

(A) All six conspired to move chemicals from boxes in closet, to the living room in plain sight.

(B) All six conspired to keep silent, the truth in my case.

(12) Falsifying Police Reports and Affadavits - Allen

(A) Allen falsified and swore to an affadavit to gain a legal search warrant.

(13) Altering Alleged Scene of a Crime.-Trumble, Garber, Allen, Badey.

(A) All four moved chemicals from closet to the living room, altering an alleged scene of a crime.

(14) Altering Evidence Seized - Allen, Badey.

(A) Both of them broke the factory seals on some of the bottles of chemicals. Then disposing with some of the chemicals from the bottles to make them look used.

(15) Perjury to gain a conviction - Allen.

(A) On April 27th, 1978, Allen committed perjury in the Circut Court of Arlington County, State of Virginia. He committed perjury to gain a conviction on my case.

V. Relief

State briefly exactly what you want the court to do for you.

On charges numbers one through four (1 to 4).

(A) I could of been killed when struck by the pistol.

(B) The pistol being jabbed in my side could of gone off.

(C) They violated my constitutional rights by excessive force and brutality.

For all of the above, I would like to recieve $2,275,000.00 for both compensatory and punitive damages.

On charges numbers five through fifeteen (5 to 15).

(A) For the ruining of the remainder of my life with a felony conviction.

(B) For the worry and mental anguish my family, wife and I went through, am now going through and will go through till the remainder of my 25 year sentence.

For all of the above, I would like to recieve $2,725,000.00 for both compensatory and punitive damages.

Signed this 23 day of January, 1979.

/s/ John F. Prosise

[Signature of plaintiff or plaintiffs]

VERIFICATION

State of Virginia)
County of Arlington)

JOHN F. PROSISE, being first duly sworn, under oath, says: that he is the plaintiff in this action and knows the content of the above complaint; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

/s/ John F. Prosise

[Signature of affiant-plaintiff]

Subscribed and sworn to before
me this 23 day of January,
1979.

/s/

[Notary Public or other
person authorized by law
to administer an oath]

My Commission Expires 10-30-79

U.S. District Court
Eastern District of Virginia
[Insert appropriate court]

JOHN F. PROSISE
(Petitioner)

v.

GILBERT HARING - HENRY ALLEN - J. R. BADEY - ALVIN BEUCHART - GARBER (Respondent(s)) THOMAS TRUMBLE

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, John F. Prosise, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed?

   Yes ___ No X

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

April, 1978 $800.00

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes X No ____

b. Rent payments, interest or dividends? Yes ____ No ____

c. Pensions, annuities or life insurance payments? Yes ____ No ____

d. Gifts or inheritances? Yes ____ No ____

e. Any other sources? Yes ____ No X

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months. (A) Roofer - $1,500.00 (appromently)

3. Do you own any cash, or do you have money in a checking or savings account? Yes X No ____ (Include any funds in prison accounts)

If the answer is yes, state the total value of the items owned.

$14.00 canteen account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes X No ___

   If the answer is yes, describe the property and state its approximate value. 1958 Harley Davidson Motorcycle - $00.00

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

   I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

/s/ John F. Prosise
(Petitioner's signature)

State of Virginia.
County (City) of Arlington.

John F. Prosise, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

/s/ John F. Prosise
Signature of Plaintiff (Required as to each plaintiff)

Subscribed and sworn to before me this 23 day of January, 1979.

/s/
Notary Public or other person authorized to administer an oath

My Commission Expires
10-30-79

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

O R D E R

Let the complaint of John Franklin Prosise be filed *in forma pauperis*.

Plaintiff has filed a complaint charging defendants with: (1) use of excessive force during his arrest; (2) forcible entry and trespass; (4) illegal arrest; (5) failure to advise of *Miranda*. rights; (6) illegal search and seizure because of a defective search warrant; and (7) perjury.

It is the opinion of this Court that plaintiff's complaint states causes of action insofar as it alleges use of excessive force and assault and an illegal search and seizure. From plaintiff's account of the facts it does not appear that the defendants acted outside their duty in entering

plaintiff's apartment or arresting him in the situation of a potentially dangerous domestic quarrel. Defendants' alleged failure to advise plaintiff of his rights does not appear significant in that plaintiff does not allege that he made any incriminating statements. Accordingly, defendants are hereby

ORDERED to respond to plaintiff's allegations of excessive force and illegal search and seizure within twenty (20) days. Plaintiff's other claims are hereby conditionally dismissed. Dismissal becomes final within twenty (20) days unless plaintiff can show how those actions violated his constitutional rights.

The Clerk is directed to send a copy of this Order to the plaintiff and to serve a copy of this Order and the complaint upon the defendants and the County Attorney for Arlington County, Virginia.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
February 5th, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

MOTIONS OF THE DEFENDANTS TO DISMISS AND FOR SUMMARY JUDGMENT

The defendants, Haring, Trumble, Garber, Beuchart, Allen, and Badey, by counsel, move this Court as follows:

1. To dismiss, pursuant to Rule 12(b)(6) for failure to state a claim, or alternatively to grant summary judgment, pursuant to Rule 56, as to the claim of excessive force during the arrest of plaintiff on September 7, 1977.

2. To grant summary judgment, pursuant to Rule 56, as to the claim of an illegal search and seizure (because of a defective search warrant) on the specific grounds:

a. The claim is barred under the doctrine of collateral estoppel as a result of the

plaintiff's plea of guilty to a criminal charge wherein the issue was necessarily adjudicated and waived;

b. There are no material facts genuinely in issue and the claim is without merit as a matter of law;

c. The defendants cannot be held liable for any damages as a result of search incident to a search warrant since reliance upon the warrant is *per se* reasonable and in good faith.

3. To grant the defendants their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 upon dismissal of the action because the action of the plaintiff is brought in bad faith, is vexatious and frivolous.

LT. GILBERT A. HARING
DET. HENRY W. ALLEN
DET. J. R. BADEY
OFF. ALVIN BEUCHART
OFF. THOMAS TRUMBLE
OFF. STANLEY GARBER

By Counsel

/s/

Jerry K. Emrich
Arlington County Attorney

/s/

David R. Lasso
Assistant County Attorney
1400 N. Courthouse Road, #106
Arlington, Virginia 22201
(703) 558-2705
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motions of the Defendants to Dismiss and For Summary Judgment was mailed, postage prepaid, to John Franklin Prosise, the Plaintiff, c/o Arlington County Detention Center, 1400 N. Courthouse Road, Room 500, Arlington, Virginia 22201, on this 26th day of February, 1979.

/s/ David R. Lasso

AFFIDAVIT FOR SEARCH WARRANT

Commonwealth of Virginia:

County of Arlington, to wit:

Before Me, _____, a Special Magistrate of said County or Judge of the County Court for the County aforesaid, as shown on signature line, this day, appeared Det Henry W. Allen #463 ACPD and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made.

Phencyclidine as listed in Section 54-524.84:6 Schedule II, Code of Virginia and possessed in violation of Section 18.2-250(A) Code of Virginia.

(2) The material facts constituting probable cause for issuance of the warrant.

The following information from Police Agent A. P. Beuchert #431 ACPD was received by the affiant: On September 7, 1977, at about 2115 hours Officer Beuchert received a call via police dispatcher that a man was being stabbed at 224 North Glebe Road, Apt #4, Arlington, Virginia. Upon Arrival, Officer Beuchert heard suspected gunshots coming from that location. After knocking a subject came to the door holding two hand guns. Officer Beuchert and Trumble took the weapons from the subject and placed him under

arrest for discharging a firearm. Upon search of the subject a quantity of suspected Phencyclidine was found on his person. A femal subject who was also living at that address told Officer Beuchert that there were more drugs in the apartment and showed him where a plastic bag of suspected Phencyclidine was. This was also confiscated by Officer Beuchert.

At about 2200 hours on September 7, 1977, affiant was called to respond to 224 North Glebe Road, Apt #4, Arlington, Virginia. Upon arrival affiant smelled what he believed to be the odor of ether inside the apartment. Affiant also observed various chemicals which affiant has knowledge of are many times used in the manufacture of Phencyclidine. Affiant then returned to the station while Officers Trumble and Garber held the apartment secured. Affiant performed a preliminary field test on the suspected Phencyclidine and obtained a positive reaction.

Affiant's training and experience includes approximately four years as a Narcotics Enforcement Officer during which time affiant has observed Phencyclidine on at least 100 occasions. Affiant has successfully completed the Drug Enforcement Administration Training School and is also attended several Federal, State and local Narcotics Seminars.

It is the belief of the affiant that Phencyclidine is presently being stored on the below described premises.

(3) What is to be searched for under the warrant?

Phencyclidine as listed in Section 54-524. 84:6 Schedule II, Code of Virginia and possessed in violation of Section 18.2-250(a) Code of Virginia.

(4) The house, place, vehicle, or baggage to be searched.

All of a certain premises known as 224 North Glebe Road, Apt #4, Arlington, Virginia, the same being a red brick two story multi apartment dwelling.

Signature of affiant_____

Subscribed and sworn to before me this___day of_____, 19___ at____(a.m.)(p.m.)

_____
Special Magistrate/Judge

Certified of the Clerk of the Circuit Court of Arlington County.

_____
Special Magistrate/Judge

V I R G I N I A:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

C-12,689 and C-12,951

COMMONWEALTH OF VIRGINIA

vs.

JOHN FRANKLIN PROSISE

PLEA AGREEMENT
MEMORANDUM

COME NOW the Commonwealth of Virginia, by her Attorney, the defendant, John Franklin Prosise, and his attorney, Ian M. Rodway, and represent to the Court that a plea agreement has been entered into by the respective parties for the disposition of these cases. The aforesaid agreement consists of the following provisions, which constitute the entire agreement:

1. The defendant agrees to enter a plea of guilty to Indictment C-12,689, wherein he is charged with the manufacturing of a controlled substance, to wit: Phencyclidine, a Schedule II substance.

2. The Commonwealth agrees to enter a *nolle prosequi* in case C-12,951, wherein the defendant is charged with the possession of a

controlled substance, to-wit: Phencyclidine, a Schedule II substance.

3. The defendant acknowledges the following:

a) That no agreement exists with respect to sentencing.

b) That every part of this agreement has been written down and appears herein.

c) That he has discussed this memorandum with his attorney.

d) That this agreement was voluntarily reached, that no officer or employee of the State, County, Commonwealth's Attorney's Office, Counsel for Defendant, or anyone else, has made any promises of leniency to him, outside of this agreement, or threats in exchange for his entering into this agreement.

e) That the judge will be informed of this plea agreement but that the Court is not bound to follow it.

f) That he understands that no promise or agreement which is not disclosed to the Court and contained in this memorandum will be recognized.

4. The defendant understands that upon being found guilty of manufacturing a controlled substance, to-wit: Phencyclidine, a Schedule II substance, he may receive a term of imprisonment of not less than five nor more than forty years and a fine of not more tha twenty-five thousand dollars.

SEEN AND AGREED this 27th day of April, 1978.

/s/

John Franklin Prosise,
Defendant

/s/

Kenneth E. Melson,
Attorney for the
Commonwealth

/s/

Ian M. Rodway,
Counsel for Defendant

PLEA AGREEMENT TRANSCRIPT

April 27, 1978

(Begin Transcript page 6)

Whereupon,

DETECTIVE HENRY ALLEN,

was called as a witness by and on behalf of the Commonwealth of Virginia, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q State your name for the court.

A Henry W. Allen.

Q By whom are you employed?

A Arlington County Police Department. I am an officer working in the Narcotics Division.

Q How long have you been in Narcotics?

A Four and a half years.

Q How long have you been a police officer?

A Six years.

Q Directing your attention to September 7, 1977, did you have occasion around 10:00

o'clock to respond to 224 North Glebe Road, Apartment No. 4, in Arlington?

A Yes, I did.

Q Tell us why you responded there and what you found.

A I received a radio call while in the vicinity, to respond to 224 North Glebe Road, Apartment No. 4, and I (Begin Transcript page 7) responded; and there were two uniformed police officers there, and an individual named John Prosise, who had been arrested on a charge which included the possession of a controlled substance.

Q What did that substance turn out to be?

A Phencyclidine.

Q Was that taken to the laboratory?

A Yes, it was.

Q Did you receive a certificate of analysis?

A Yes, sir.

Q May I have this marked as Commonwealth's Exhibit No. 1?

(The above-mentioned certificate was marked as Commonwealth's Exhibit No. 1 for identification.)

BY MR. MELSON:

Q Is this the certificate which you received?

A Yes, sir, it is.

Q And what else occurred while you were at that address of 224 North Glebe Road?

A Upon my arrival, I smelled an odor of ether, and upon looking around, saw some chemicals about the apartment. I observed a quantity of a substance of what I believed to be (Begin Transcript page 8) PCP upon the living room table. At the time, I asked the officer to hold the place secured.

Q Do you know who the occupant of that apartment was?

A John Prosise, and Katherine Eileen Denni.

Q Did you find a lease to the apartment with his name on it?

A Yes, I did.

Q Did there come a time you were issued a search warrant for the apartment of 224 North Glebe Road?

A Yes, I did.

Q What occurred after the search warrant was issued?

A My partner, Detective Petti, and I returned to the apartment at 224 North Glebe Road and executed the search warrant on the premises at approximately 2400 hours on the 7th.

Q What was seized as a result of that search?

A The property Detective Petti and I seized included two jars of cyclohexanone, two jars of cyanide, scales, a four gallon can of Coleman's fuel, two jars of lye, assorted drug paraphernalia, a jar of iodine, a jar of hydrochloric acid, four plastic baggies of suspected PCP, four 8 ounce cans of parsley, two plastic buckets with traces of suspected PCP.

Q (Begin Transcript page 9) Did you mention anything about parsley being found?

A Yes.

Q Were any papers seized during the search?

A Assorted papers, several receipts from Norris Strong Chemical Company in Prince George's County, and customer receipts from supply places or parsley places.

Q Do you recall what was included in one of the two devices you seized?

A Yes, sir, among the personal papers I seized were two devices. One had what I believe to be a formula to make PCP, and it was later confirmed by Dr. Hepner.

Q What were the customer receipts for?

A The customer receipts were for assorted chemicals used in the manufacture of phencyclidine. I transported those to the Northern Virginia Lab, to a Mr. Davis for handwriting analysis.

Q Did they have the defendant's handwriting on it?

A It had John F. Prosise on it, and Mr. Davis confirmed that they were written by Mr. Prosise.

Q Let me show you the two laboratory certificates, these are exhibits 2 and 3. Can you identify what these exhibits are?

((Begin Transcript page 10) The above-mentioned documents were marked Commonwealth's Exhibits No. 2 and 3 for identification.)

A I received these from Mr. Davis in reference to the handwriting samples of the questioned document, and the known handwriting.

Q Did he conclude that the handwriting was that of Mr. Prosise?

A Yes, it does.

Q And the signature on the customer receipt, is that of Mr. Prosise?

A Yes, it is.

Q Did you take the chemicals to the laboratory?

A Yes, I did, I transported them to the Northern Virginia Forensic Laboratory on the 8th of September, the following day.

Q Did you receive, as a result of the analysis, a certificate of analysis?

A I turned the chemicals to Pauline Wagner, and she returned them back to me with an analysis report.

((Begin Transcript page 11) The above-mentioned document was marked Commonwealth's Exhibit No. 5 for identification.)

BY MR. MELSON:

Q Let me show you first, Dectective Allen, the report which is marked as Commonwealth's Exhibit No. 5, and ask you what the chemist's second finding was.

A There were two items, one envelope containing a green material; and an item containing a white crystal type material. The chemist report states that item two was what is known as PCC, the intermediate stage of PCP.

Q How many stages are there in the manufacture of PCP?

A Two stages. The end result of the first stage, which is the intermediate, is PCC.

Q Is that what is referred to on the laboratory report?

A Yes, sir.

Q Let me show you Exhibit No. 4. Can you identify this laboratory certificate?

(The above-mentioned document was marked Commonwealth's Exhibit No. 4 for identification.)

A (Begin Transcript page 12) Yes, sir, I can.

Q From whom did you receive that?

A I received that from Pauline Wagner at the Northern Virginia Forensic Laboratory in reference to the chemicals I took out there for analysis.

Q Did she conduct an analysis of the two buckets you seized from the home?

A The two buckets were found to contain PCP.

Q Is that the complete product?

A Yes, sir.

Q Did she confirm the presence of other chemicals that were seized?

A Yes, sir.

Q Were there any other chemicals needed to manufacture PCP that were not seized from the defendant's home?

A Yes, sir, sodium metabisulfite, piperidine, bromobenzene.

Q Are any of the chemicals necessary in the first stage of the operation?

A In the first stage you must have piperidine and sodium metabisulfite may be used.

Q The completed product of the first stage was found?

A Yes, it was.

Q (Begin Transcript page 13) Do you know whether, even though the defendant had completed the first stage, he had ordered an addi-

tional quantity of sodium metabisulfite and piperidine?

A Yes, sir, I have a cancelled receipt from Norris Strong, which states an order was called in and was made for the sodium, the bromobenzene and the piperidine on September 6, 1977.

Q These would not have been needed to complete a batch?

A No.

Q What is bromobenzene used for?

A It is used in the second stage.

Q With the Grignard Reagent?

A Yes, sir, it is.

Q That was also ordered by the defendant?

A Yes, sir.

Q In that same order?

A Yes, sir.

Q When was the order made?

A September 6, 1977, and it was cancelled December 6.

Q You referred also to one of the items as being parsley?

A Yes, sir.

Q (Begin Transcript page 14) Did you find any tickets referring to an order for parsley?

A I found a copy of an order from Atlantic issued for four cases, each case containing six 8 ounce cans of parsley.

Q How many pounds is that?

A Twelve pounds.

Q How many?

A Twenty-four 8 ounce cans, 12 pounds.

Q You didn't find 10 pounds there?

A I did not.

Q Did you find any empty cases?

A I did not.

Q Do you know how much of the intermediate stage was first found by weight?

A 82.5 grams in the intermediate stage.

Q How much PCP could be made from that?

A In discussing it with Dr. Hepner at the Northern Virginia Laboratory, using the formula, he estimated it would produce 2.2 pounds, roughly.

Q Is PCP then spread over parsley?

A Yes, sir.

Q When you are saying 2.2 pounds of PCP, or 2.2 pounds of killer weed, why is the parsley used?

A (Begin Transcript page 13) In the final product it is spread over the parsley. The total amount that was seized was calculated that it would have produced about 44 grams of a finished product of PCP.

THE COURT: That is not 44 grams treated with parsley.

THE WITNESS: No, sir.

THE COURT: Do you know the amount of PCP, how much would be needed to treat it with parsley?

THE WITNESS: Dr. Hepner said 44 grams could be treated with two pounds of parsley.

BY MR. MELSON:

Q How much parsley did you find?

A Twelve pounds.

Q What is the estimated, from your experience, the market value on the street of parsley treated PCP?

A It would go from $1500 to $1700 a pound.

Q Did you mention that a 3-A triple beam balance scale was found?

A Yes, sir.

Q And is the person you are referring to John Franklin Prosise —

MR. RODWAY: (Interposing) We stipulate it is him.

MR. MELSON: (Begin Transcript page 16) We have no further questions.

MR. RODWAY: We have no questions.

MR. MELSON: There supposedly has been filed with the court copies of the originals, and if we can substitute them, I would like permission to retrieve the others.

THE COURT: I don't see the file here.

MR. MELSON: I think they are in the clerk's office in an accordian file. So, I introduce these as the copies here, and the others are the originals.

THE COURT: Let me have these. If he can have your permission to receive these —

MR. RODWAY: (Interposing) Yes, sir.

THE COURT: All right, they are received in evidence, and the copies that are in the clerk's office may be released to the Commonwealth Attorney.

(The documents marked Commonwealth's Exhibits 1 to 5 were received in evidence.)

Does the Commonwealth have any further evidence?

MR. MELSON: No, sir.

THE COURT: Does the defense wish to present any evidence?

MR. RODWAY: No, sir.

THE COURT: (Begin Transcript page 17) The court finds the plea of guilty to be voluntarily and intelligently tendered and finds there is a sufficient factual basis; and upon the evidence heard this morning, the court finds the defendant guilty of the manufacture of phencyclidine as charged in the indictment C-12689.

Do you request a presentence report?

MR. RODWAY: Yes, sir.

THE COURT: No sentence is imposed at this time, and the case is referred to the Probation Parole Office for the preparation of a presentence report.

MR. RODWAY: He was born in Arlington and he has lived here on and off. He was in the military, and in essence he has lived a long

residence in this area, though I can't say everyone of his family was born here. His family moved away and then came back. His mother came back. He has not been any trouble.

THE COURT: June 9?

MR. MELSON: That is fine with the Commonwealth.

MR. RODWAY: Yes, sir.

THE COURT: This case is continued to June 9 for sentencing, subject to a presentence report.

Do you have a motion with respect to 12951?

C-12689

COMMONWEALTH OF VIRGINIA

vs.

JOHN FRANKLIN PROSISE

THE 15th day of June, 1978 came the Commonwealth of Virginia, by its Attorney, the Defendant in custody of Sheriff and the Defendant's retained Attorney, Ian Rodway.

WHEREUPON the Defendant acting pro-se, moved the Court to withdraw his plea of guilty heretofore entered in this case: which said motion the Court denied.

IT APPEARING to the Court that the Defendant was previously found "Guilty" of "Manufacturing of a controlled substance, to-wit: Phencyclidine" this case was continued to this date for the imposition of sentence.

WHEREUPON the Defendant was asked if he had read and understood the report and further if he had discussed the report with his counsel, to all of which the Defendant replied in the affirmative.

THEREUPON the Attorney for the Defendant was asked if he desired to have the Probation Officer or any other witness sworn to testify

regarding the matter before the Court, to which the Attorney for the Defendant replied in the negative.

THEREUPON the Court ordered that the report of the Probation Officer be filed as a part of the record in this case after certain discrepancies were noted therein, as are more specifically set forth in the stenographic record of this case.

AND IT BEING DEMANDED of the accused if he desired to make a statement or to advance any reason why judgment should not be pronounced against him according to law, both he and his counsel made statements to the Court.

THEREUPON the Court, taking into consideration said statement and all of the evidence in the case, the report of the said Probation Officer and argument of counsel, doth ascertain and fix the punishment of the accused to be confinement in the Penitentiary of this Commonwealth for a period of twenty-five (25) years and a fine of $1,000.00 and payment of the costs of these proceedings.

IT IS ACCORDINGLY the Judgment of this Court that the said John Franklin Prosise be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term

of twenty-five (25) years and a fine of $1,000.00, the period by the Court ascertained as aforesaid, and that the Commonwealth of Virginia, do recover against the said John Franklin Prosise its costs by it about its prosecution in this behalf expended.

IT IS FURTHER ORDERED by the Court that as soon as possible after the entry of this order, the Defendant be removed and safely conveyed according to law from the Jail of this Court to the Penitentiary of this Commonwealth; therein to be kept, confined and treated in the manner provided by law.

THE COURT ORDERS that the Defendant be allowed credit for the time spent in jail awaiting trial, namely September 8, 1977 (one day) and since April 27, 1978.

THE COURT CERTIFIES that at all times during the trial of this case the accused was personally present.

THE birth date of the Defendant is December 25, 1954.

AND the Defendant is hereby remanded to jail.

ENTERED this 23rd day of June, 1978.

/s/ Charles S. Russell
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 79-105-AM

JOHN FRANKLIN PROSISE,

Plaintiff,

v.

LT. GILBERT A. HARING, et al.,

Defendants.

O R D E R

The Court has received defendants' answer, motion to dismiss or for summary judgment, memorandum in support of that motion and supporting affidavit of facts. These pleadings respond to plaintiff's allegations that defendants used excessive force during plaintiff's arrest and that the search warrant issued to authorize the search of his apartment was defective, thereby making the search and seizure illegal.

With respect to plaintiff's first claim of excessive force, defendants submit the following: that on September 7, 1977, several of the defendants, who were Arlington County police officers, responded to a call for assistance made by the plaintiff; that upon arrival at plaintiff's apartment

the officers saw plaintiff and his fiance, Katherine Denny, at the window and heard them accuse each other of holding a gun; that upon approaching the door of plaintiff's apartment the officers heard Denny shout that "he has a gun;" that after announcing themselves the officers attempted unsuccessfully to open the door; that the officers then heard two gunshots and promptly drew their weapons; that plaintiff opened the door and stood in the doorway holding a revolver and a pistol; that plaintiff was told to drop his weapons but refused to do so; that the officers then seized plaintiff and attempted to disarm him by force; that a brief scuffle ensued during which defendant Trumble struck plaintiff with his fist to force plaintiff to drop his weapons; and that plaintiff was thereafter disarmed, handcuffed and taken into custody.

These sworn representations entitle defendants to summary judgment on claim (1). Plaintiff's possession of two weapons and refusal to drop them upon request by police officers fully justified the reasonable use of force to disarm plaintiff. The fact that plaintiff was six foot four inches tall and was engaged in a heated argument involving weapons further support the reasonable use of force to ensure the officers' safety. Even accepting as true plaintiff's allegation that Of-

ficer Trumble jabbed him hard with his pistol and threw plaintiff toward a couch, the Court views these acts as reasonable responses to the threat posed by an armed and uncooperative individual. Although plaintiff alleges that Officer Beuchert struck him in the head with a pistol butt with enough force to fracture plaintiff's cheekbone, defendants' affidavit does not indicate that such a blow was struck. The Court concludes that defendants deny that Officer Beuchert delivered such a blow since defendants' sworn affidavit, purporting to recite the events in question, omits any reference to a pistol-whipping. The Court relies on this sworn affidavit in arriving at the conclusion that defendants used reasonable force in subduing plaintiff and therefore are entitled to summary judgment. As indicated below, the award of summary judgment is made conditional for the purpose of affording plaintiff an opportunity to submit an affidavit that contradicts defendants' version of the facts in question, particularly the actions of Officer Beuchert with reference to the alleged pistol-whipping.

In his second claim plaintiff attacks the validity of the search warrant obtained by the defendants to authorize the search of plaintiff's apartment. In his complaint plaintiff stated that the search warrant obtained to seize chemicals and devices used to manufacture phencyclidine

(PCP) contained "false information" that was used to "set up" the plaintiff. In an attempt at explanation plaintiff asserted that the search warrant was directed at chemicals in the living room whereas in reality they were located in the closet; he further contended that the officers who executed the warrant (defendants Allen and Badey) emptied out some of the contents of the chemical bottles in order to create the appearance of use by the plaintiff. He further charges officers Allen and Badey with seizing chemicals that were not authorized to be seized in the warrant and with moving chemicals around so that they would appear in plain view. Finally, plaintiff maintains that Officer Beuchert exceeded the scope of the search warrant by seizing drugs out of a shirt located in the bathroom.

Defendants contend that plaintiff is collaterally estopped from contesting the validity of the search warrant because he pled guilty to a charge that was predicated on the fruits of the search. They also present an alternative argument suggesting that the search warrant was valid and supported by an appropriate affidavit (see defendants' exhibit A) and that the officers did not exceed the scope of the warrant.

The Court is also convinced of the validity of the warrant and subsequent search. Certainly

detective Allen's affidavit, based upon his own observations and the statements of Katherine Denny, were sufficient to make the requisite showing of probable cause. *Berger v. New York*, 388 U.S. 41 (1967); *United States v. Ventresca*, 380 U.S. 102 (1965). Moreover the scope of the search did not exceed the items set forth in the search warrant.[1] *Andresen v. Maryland*, 427 U.S. 463 (1976). But the disposition of plaintiff's fourth amendment claim should not, at this stage, be based upon its merits where, as here, defendants assert that collateral estoppel bars any consideration of the merits in the first instance. In support of this argument defendants refer the Court to the Fourth Circuit's recent decisions in *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977), and *Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978). Those cases, however, do not stand for the proposition suggested by the defendants. In *Rimmer* the court held that the doctrine

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[1]The Court also notes that the search of plaintiff's apartment can in part be upheld as a consent search because Ms. Denny, who also resided at the apartment, led officers to a hall closet containing PCP and apparatus used in its manufacture. Since Ms. Denny possessed "common authority" over the premises, the search can be justified without regard to a warrant. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Carter*, 569 F.2d 801 (4th Cir. 1977).

of collateral estoppel foreclosed assertion of a state prisoner's claim that identification testimony was unconstitutionally admitted into evidence because the issue was precluded by the standing state conviction. The *Rimmer* court explicity refrained from deciding the availability of a § 1983 cause of action where there is no right of access to a federal habeas forum. The court recognized that such a situation could arise with respect to fourth amendment claims because the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), normally would foreclose state prisoners from litigating such claims in a federal habeas forum.

The *Rimmer* decision suggests that collateral estoppel applies only to those issues which can be presented a federal habeas forum. *Von Lusch v. C & P Tel. Co.*, 457 F.Supp. 814 (D. Md. 1978). That suggestion is implicit in the *Rimmer* court's observation that "[s]ince it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases [in which federal review is otherwise unavailable]." 567 F.2d at 276. Since a fourth amendment claim normally is not subject to

federal habeas review,[2] plaintiff in this action would be unable to litigate his claim of illegal search and seizure unless he is permitted to do so under § 1983.[3]

This case is complicated, however, by the fact that plaintiff's conviction was secured through a plea of guilty. This additional factor was not present in *Rimmer*, wherein the § 1983 plaintiff had actually litigated at trial his claim that a witness' identification testimony was inadmissible. *See* 567 F.2d at 275. Thus the plaintiff there was collaterally estopped from raising this claim in a § 1983 action because he "fully litigated the question he now tenders in the course of his criminal trial...." *Id.* at 276. In this case there was no criminal trial and the search and seizure question was not "fully litigated" as it was in *Rimmer*. Regardless of whether this distinction removes this case from the purview of *Rimmer*, however, the Court believes that plaintiff's plea of guilty estops him from asserting a fourth amendment claim in a § 1983 suit. The plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful. *See*

2*See Stone v. Powell, supra.*

3*See Christine M. Fore, et al. v. W. G. Newell*, Civil Action No. 78-417-AM, pp. 8-9 n. 3 (E.D. Va. October 10, 1978).

Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974); *Meadows v. Evans*, 550 F.2d 345, 351-53 (5th Cir. 1977) (per curiam) (Tjoflat, Jr., concurring in part and dissenting in part). While the plea did not include an admission of the elements of the crime such as in *Brazzell*, it did admit the facts necessary to subject the plaintiff to criminal liability. Most important, the Supreme Court has held that deprivation of constitutional rights occurring prior to a guilty plea may not be asserted in subsequent proceedings. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

In *Tollett* the Court held that a state prisoner who tenders a guilty plea may not thereafter assert on federal habeas corpus constitutional claims that relate to events that occurred prior to entry of the plea.[4] The question is

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[4]The pervasiveness of the holding in *Tollett* was somewhat limited by two subsequent decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court held that a guilty plea did not bar a prisoner's complaint that his conviction violated due process concerning "the right not to be haled into court at all...." *Id.* at 30. One year later the Court decided that a guilty plea did not bar a prisoner's double jeopardy claim. *Menna v. New*

(footnote continued)

whether this rule of preclusion should apply when a fourth amendment claim, which could not in most instances be raised in a federal habeas petition, is presented in a § 1983 suit. Two values conflict here; the interest, discussed above, in affording this plaintiff access to the § 1983 forum and the "waiver" effect attendant to a guilty plea adverted to by the *Tollett* Court. Certainly a claim of illegal search and seizure is the kind of non-jurisdictional defect that a defendant may not thereafter assert in a habeas corpus petition under *Tollett*. As the Court later explained in *Menna v. New York*, 423 U.S. 61, 62-63 n. 2 (1975) (per curiam), a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established."

Recent decisions of the Supreme Court establish beyond doubt that search and seizure claims are unrelated to the existence of "factual guilt." *Stone v. Powell, supra* at 489-90; *United*

(footnote continues)

York, 423 U.S. 61 (1975) (per curiam). *See also United States v. Bluso*, 519 F.2d 473 (4th Cir. 1975); *United States v. Sams*, 521 F.2d 421 (3d Cir. 1975); *Williams v. State of Md.*, 445 F.Supp. 1216 (D. Md. 1978).

States v. Janis, 428 U.S. 433 (1976); *Kaufman v. United States*, 394 U.S. 217 (1969). Notwithstanding the unavailability of the federal habeas forum under *Stone*, therefore, plaintiff's fourth amendment claim would not be cognizable in any event because his plea of guilty foreclosed access to habeas corpus under *Tollett*. It follows that the considerations referred to above that may make appropriate the availability of the § 1983 cause of action because of the preclusive effect of *Stone* do not pertain to cases in which there is the added element of a guilty plea. Plaintiff's guilty plea cut off his access to a federal habeas forum to litigate a fourth amendment claim and at the same time should have a similar effect upon a § 1983 suit. If a defendant who pleads guilty is foreclosed from obtaining his freedom because of an illegal search and seizure, he should not be allowed to secure damages in a § 1983 suit and thereby litigate the antecedent constitutional question relating to the search that could not otherwise be heard because of *Tollett*. The Court thus concludes that plaintiff's fourth amendment claim cannot be maintained in this § 1983 action under the reasoning undergirding the *Tollett* decision.

For the foregoing reasons, it is hereby

ORDERED that conditional summary judgment be entered in favor of the defendants on plaintiff's claim of excessive force during arrest; summary judgment becomes final in fifteen (15) days unless plaintiff can show that the defendants' use of force was excessive. Summary judgment will be entered in favor of the defendants on plaintiff's claim of unlawful search and seizure and that claim stands dismissed.

Finally, plaintiff's numerous submissions included an affidavit from his wife, Katherine I. Prosise, that sets forth a claim that she was touched in an offensive manner by Officer Badey. This claim is unrelated to the alleged violation of her husband's civil rights, which is the subject of the suit against the defendants, and therefore must be dismissed without prejudice. Should Mrs. Prosise desire to file suit on her own behalf based on her claim of assault, she is free to do so in a separate action.

The Clerk is directed to send copies of this Order to the plaintiff and to the County Attorney for Arlington County, Virginia.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
April 17, 1979

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer;
and GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued June 2, 1981 Decided December 30, 1981

Before WINTER, BUTZNER,
and PHILLIPS, Circuit Judges.

Norman A. Townsend (Sebastian K. D. Graber, Graber, Stetler and Townsend on brief) for Appellant; David R. Lasso, Assistant County Attorney (Jerry K. Emrich, Arlington County Attorney on brief) for Appellees.

PHILLIPS, Circuit Judge:

Prosise appeals the district court's grant of summary judgment dismissing his claims under 42 U.S.C. § 1983 that Arlington County, Virginia police officers violated his constitutional rights by using excessive force in arresting him and by conducting a search and seizure in violation of the fourth and fourteenth amendments. The district court held that the officers' use of force was reasonable and not excessive under the circumstances and that the search and seizure claim was precluded by Prosise's guilty plea in the related state court criminal prosecution. We affirm the district court's dismissal of the excessive force claim, but we reverse and remand the search and seizure claim for further proceedings because we do not think the state conviction based on a guilty plea should preclude litigation of that claim.

I

In September 1977, the defendants, County Police Officers Haring, Trumble, Beuchert and Garber, answered a radio call about a domestic disturbance. Arriving at the scene, the officers saw Prosise and a woman, Katherine Denny, at the window of the apartment. Both Prosise and Denny yelled to the officers that the other had a gun, and Prosise held his arm out of the window showing a wound where Denny had stabbed him.

Prosise called to the officers that he would let them in if they came up.

The officers went up the stairwell and stood outside the door on a landing. They announced themselves and attempted unsuccessfully to open the door. After hearing two gunshots, they drew their guns and tried to kick the door in. At that moment, Prosise - who is six feet four inches tall - opened the door and greeted the officers with two handguns in his left hand. The officers ordered him to back away and drop his weapons. He refused to do so, even when one officer pointed a gun at his chest and repeated the order. Fearing that he might use his weapon, the officers seized him and sought to disarm him by force.

A scuffle ensued, during which the officers subdued and disarmed Prosise. He was handcuffed and taken into custody and was later treated at a local hospital for abrasions. Prosise claims that the officers struck him in the cheek with a pistol during the scuffle, while Trumble remembers only that he struck him with his fist in order to disarm him.

After Prosise was taken away, Denny told the officers that Prosise was manufacturing drugs and that he kept them in a closet. She led them to a closet and showed them a baggie she said

contained "PCP" (phencyclidine or "angel dust") and the substances and devices which she said Prosise used in making PCP.

The officers did not seize any of the articles but called Narcotics Detective Allen to the scene. This practice is standard when drugs of this nature are involved because the chemicals are often volatile and can be dangerous. Detective Allen noticed a smell of ether, saw the chemicals in the closet and concluded that these chemicals were probably being used to manufacture PCP. Allen left the two remaining officers to secure the area and went to the magistrate for a search warrant. Allen returned with a search warrant, and the officers searched the apartment, seizing the chemicals and drug paraphernalia.

Prosise was later charged in a state prosecution with a count of manufacturing phencyclidine and a count of possession of phencyclidine. He executed a plea agreement wherein he was to plead guilty to the count of manufacturing in return for a *nolle prosequi* of the count of possession. The Arlington Circuit Court accepted his guilty plea. At the hearing, Detective Allen testified about the search of Prosise's apartment, explaining that a chemist had identified the chemicals seized as being PCP in various stages of manufacture.

At sentencing some weeks later, Prosise attempted to withdraw his guilty plea. The court denied Prosise's motion to withdraw the plea and imposed a sentence of fine and imprisonment. The Virginia Supreme Court denied his petition for writ of error challenging the voluntariness of his plea and the refusal of the trial court to permit the withdrawal of the plea. *Prosise v. Commonwealth*, Record No. 78-1479 (July 17, 1979).

Prosise then commenced this action in the United States District Court for the Eastern District of Virginia alleging, under 42 U.S.C. § 1983, a denial of his constitutional rights under color of state law. He claimed, among other things, that the officers had used excessive force during this arrest and had engaged in an illegal search and seizure. The district court dismissed all but these two claims, and the defendants moved for summary judgment as to them.

The district court granted summary judgment for the defendants on the excessive force claim, based on the uncontradicted sworn statements of the officers explaining the circumstances of their use of force, and on the fourth amendment claim, on the basis that recovery was precluded by Prosise's guilty plea. This appeal followed.

Prosise contends here that his verified complaint sufficiently stated a cause of action under § 1983 for the use of excessive force, and that it was uncontradicted by the defendants' affidavits supporting their motion. The defendants did not deny his allegation that he was "pistol-whipped." At the very least, then, he is entitled to a plenary evidentiary hearing. He further contends that, on the authority of *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), this court should enter summary judgment in his favor.

Second, he argues that he is not precluded by his guilty plea from maintaining a § 1983 action against the arresting officers for illegal search and seizure. Under the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), holding that the conventional doctrines of collateral estoppel are to be applied to § 1983 claims, he contends that his fourth amendment claim is not precluded because it was not actually litigated in the state criminal action.

II

We consider first Prosise's claim that unconstitutionally excessive force was used in his arrest. Although we agre with Prosise that on the summary judgment record there is a factual dispute as to the exact details of the arrest encounter, we agree with the district court that

even on the facts as Prosise alleges them the force used to subdue him was not under the circumstances constitutionally excessive.

The rule applied in *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), does not help Prosise. The encounter here alleged was, on Prosise's own account, one quite different from that in *King*. Prosise, a very large man, held two handguns and refused to drop them on command. There is no suggestion that the officers applied any force subsequent to disarming and subduing him. This situation is simply unlike that in *King* where force was applied to one safely in custody "maliciously and sadistically for the very purpose of causing harm," *id.* at 73 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), but is manifestly one where the officers acted in a reasonable, hence good faith, effort to subdue an armed man who was plainly resisting lawful authority and posing a real threat of harm. We therefore agree with the district court that on the facts as stated in Prosise's verified complaint the defendants were entitled to summary judgment on this claim.

III

The district court held that Prosise was absolutely precluded in respect of his fourth amendment claim on two bases: (1) that, though the question of the search and seizure's legality

had not been "fully litigated" in the state criminal action, *cf. Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (actual litigation results in preclusion), the "plea of guilty estops him" because it "necessarily implied that the search...was lawful." *Prosise v. Haring, et al.*, C.A. No. 79-105-AM, slip op. at 5, 6 (E.D. Va. April 17, 1979); and (2) that, in any event, under *Tollett v. Henderson*, 411 U.S. 258 (1973), and its progeny, the guilty plea had the effect of waiving the antecedent constitutional objection since that objection was neither related to factual guilt or innocence nor to the right of the defendant not to be tried. *Prosise*, slip op. at 6, 7.

A

On the waiver basis for decision, we think that the specific waiver principle announced in *Tollett* properly applies only to subsequent federal habeas corpus proceedings challenging the criminal conviction. As analyzed in *Tollett*, this principle rests upon the perception that the guilty plea constitutes "a break in the chain of events" in the criminal prosecution, *Tollett*, 411 U.S. at 267, so that any subsequent habeas corpus inquiry is necessarily focused on the constitutional validity of the plea and "not the existence as such of an antecedent constitutional infirmity." *Id.* at 266. This is inapposite to the question whether a § 1983

claim based upon the "antecedent constitutional infirmity" may later be prosecuted free of any preclusive effect. In consequence, we think that whether there should be any preclusive effect is to be determined on the basis of other principles, specifically, of collateral estoppel and the full faith and credit statute, 28 U.S.C. § 1738. To those we now turn.

B

For possible guidance on these questions we withheld decision following original hearing of this appeal and reheard it on supplemental briefs following the Supreme Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), where the general problem of preclusion by collateral estoppel in § 1983 actions was presented. The decision in that case was, however, a narrowly confined one that is not of itself dispositive here. It held only that even though *Stone v. Powell*, 428 U.S. 465 (1976), may have deprived a state prisoner of a federal habeas forum to pursue a fourth amendment claim, the conventional doctrine of collateral estoppel and the full faith and credit command of 28 U.S.C. § 1738 might operate by issue preclusion to deprive him as well of the alternative § 1983 forum for pursuing it. *McCurry*, 449 U.S. at 103-05.

Specifically not decided by the *McCurry* Court was the question "*how* the body of collateral-estoppel doctrine or 28 U.S.C. § 1738 should apply," *id.* at 105 n.25 (emphasis in original), including the question "whether any exceptions or qualifications within the bounds of [the] doctrine might ultimately defeat a collateral-estoppel defense," *id.* at 95 n.7, in a subsequent § 1983 action. But the Court was at special pains to point out that the collateral estoppel doctrine to be applied is the "conventional doctrine" rather than any "new, more stringent" one, and, most specifically, that it is not one which "turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate [the] federal question." *McCurry*, 449 U.S. at 95 n.7.[1]

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[1]This last point, that collateral estoppel in § 1983 actions cannot be based solely upon the fact that a full and fair opportunity to litigate the federal issue was provided in state court, was made in specific response to the dissent's suggestion that this was the import of the majority opinion. *Allen v. McCurry*, 449 U.S. at 113 & n.12 (Blackmun, J., dissenting).

We understand the court's position to be that a state's failure to provide full and fair opportunity to litigate the issue might, within the conventional doctrine, *avoid* an otherwise appropriate application of collateral estoppel, *see Re-*

(footnote continued)

McCurry essentially, therefore, merely confirmed the general principle that had already been applied in earlier decisions of this court that under appropriate circumstances collateral estoppel might, within traditional bounds, apply to defeat § 1983 constitutional claims because the dispositive issues had earlier been decided adversely to the federal plaintiffs in state criminal actions. *See Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978) (per curiam) (attempt by § 1983 action to have state convictions expunged on federal grounds); *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273 (4th Cir. 1977) (sixth amendment claim). To this general confirmation *McCurry* added only the point - on which we had expressed reservation in *Rimmer*, 567 F.2d at 276 - that this preclusion principle is not displaced with respect

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(footnote continues)
Statement (Second) of Judgments § 68.1 (1980), rather than the obverse, that provision of the full and fair opportunity, standing alone, gives rise to collateral estoppel. As the *McCurry* dissent points out, *Allen v. McCurry*, 449 U.S. at 113 & n.12, the effect of the latter would be to equate § 1983 collateral estoppel (issue preclusion) with bar (claim preclusion) under which the § 1983 claimant would be precluded from litigating any issue that *might* have been raised in the state criminal action. The majority flatly disclaimed this as its holding and we are of course bound by that perception.

to fourth amendment claims by the nonavailability under *Stone v. Powell* of an alternative federal habeas forum. And it emphasized, to an extent our decisions to date perhaps have not, the primary importance of the command embodied in 28 U.S.C. § 1738 to seek in the law of the judgment state the precise rule of conclusiveness to be applied to its criminal judgment.

Not therefore decided by the *McCurry* Court - indeed not specifically before it on the facts of that case[2] - was the narrow question which we address and to which we expressly confine decision here. That question is whether, and if so under what circumstances, a state court judgment entered on a guilty plea may be preclusive in a federal § 1983 action of an issue which in the state action was not actually litigated and could only have been litigated in relation to the exclusion of evidence on fourth amendment grounds.

We note preliminarily that this is a different question than the more inclusive one whether a guilty plea judgment may be preclusive as to any § 1983 issue, and the related one whether it may be preclusive as to an issue, that was an essential

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[2]In *McCurry* the state conviction was not based on a guilty plea but resulted from a trial following pre-trial denial of a motion to suppress evidence on fourth amendment grounds.

element of the state crime charged. To answer the narrow question we address is not necessarily to answer either of the others, and we expressly reserve decision on them.

It is also obviously a different question from those already authoritatively answered by our decisions in *Wiggins v. Murphy*, 576 F.2d 572, *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, and, most recently, *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981) (per curiam), in each of which we gave issue preclusive effect in § 1983 actions to state judgments of conviction based upon adjudications of guilt rather than guilty pleas.[3] We therefore address it as a question of first impression on which our earlier decisions applying collateral estoppel in § 1983 cases are not dispositive.

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[3]In both *Rimmer* and *Wiggins* the specific constitutional violations charged in the § 1983 actions had been actually litigated in the state criminal trials as defenses or objections necessarily determined adversely to the state defendants. In *Cramer* the fundamental constitutional violation charged in the § 1983 action - an illegal search and seizure resulting in an alleged malicious prosecution - was not actually litigated at any stage, but as in both *Rimmer* and *Wiggins* the state judgment resulted from conviction after a trial. In *Cramer* we spoke of the defendant's failure to raise the constitutional objection at any stage as a "waive[r]." 648 F.2d at 945. *See* note 15 *infra*.

(1)

Under the command of 28 U.S.C. § 1738, *see McCurry*, 449 U.S. at 97-98 & n.11, we look first to the law of Virginia to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here in issue.[4]

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[4]The exact operation of § 1738 and its relationship to general policies of res judicata in the § 1983 context is not wholly clear. The questions have only emerged as potentially important ones with the relatively recent burgeoning of § 1983 litigation. *See generally Restatement (Second) of Judgments* § 134, Comment *d* (1980). Prior to the decision in *Allen v. McCurry*, there was a divergence of views about the relationship between § 1983 and § 1738 among both courts and commentators. *See generally* Comment, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. Mich. J. of L. Ref. 465, 486-88 (1981). It may well persist after *McCurry*. In that decision the Court did not directly address the question of the relationship between the two, but while apparently assuming their congruence, seemed also to suggest primacy for the command embodied in § 1738. *See McCurry*, 449 U.S. at 94-96. It is generally assumed that the command is to give to the state judgment the same effect - no more and no less - that the state courts would give it. *See Restatement (Second) of Judgments* § 134, Comment *g* (1980). In combination these principles of primacy for the state rule and exact enforcement of the state judgment according to its dictate would create a problem if the state rule were found to be at flat odds with "conventional doctrine." We do not face that problem here, since we find both the state rule and general principles of collateral estoppel to be sufficiently uncertain in their application to the particular

(footnote continued)

The Virginia decisions to which we have been directed do not yield a definitive answer. None has addressed the precise, narrow question of the preclusive effect of a guilty plea judgment upon issues that in the state criminal prosecution could only have been relevant to determining the admissibility of evidence. On broader questions of the preclusive effect of criminal judgments, the state's highest court stated in 1958 that the general rule in Virginia remained that expressed in 1916 in *Supervisors of Tazewell County v. Norfolk & Western Railway Co.*, 119 Va. 763, 91 S.E. 124 (1916) that

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czoka, 200 Va. 385, 105 S.E.2d 869, 872 (1958). In *Czoka*, a

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(footnote continues)
kind of issue here involved that no choice is forced. In consequence, we can reserve that thorny question for another day.

person in privity with the civil defendant had pled guilty to an offense that had as an essential element a dispositive issue in the civil action before the court. The plaintiff sought preclusive effect as to this issue from the criminal conviction. Applying the general rule from *Tazewell County*, the court refused any preclusive effect. The next year this general rule was again recognized, in dictum, as applying to criminal judgments, in *Smith v. New Dixie Lines, Inc.*, 201 Va. 466, 111 S.E.2d 434 (1959) (dictum: party sought to be precluded not party to criminal action nor otherwise bound by criminal judgment). So far as our research discloses, these two decisions remain the most recent pronouncements and applications of Virginia's general rule relating to the preclusive effect of *criminal* judgments.

To this general rule against preclusion, the Virginia courts have apparently applied only one narrow exception. A plaintiff, previously convicted of arson, has been held precluded by the conviction from recovering the proceeds of a fire insurance policy covering the building he was found guilty of burning. *Eagle, Star & British Dominions Insurance Co. v. Heller* 149 Va. 82, 89, 140 S.E. 314, 316 (1927). Subsequent decisions, adhering to the general rule, have simply recognized *Heller* as an exception to it. *See Smith v.*

New Dixie Lines, Inc., 201 Va. 466, 472-73, 111 S.E.2d 434, 438-39 (1959); *Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 389, 105 S.E.2d 869, 872 (1958).

These Virginia decisions seem, therefore, to establish that, except in the narrow context of the arson conviction in *Heller*, criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect in subsequent civil litigation.[5] Virginia's narrow rule of preclusion as announced in *Heller*, where conviction was by adjudicated guilt and where the issues precluded were esential elements of the crime charged, does not by necessary implication apply to the preclusive effect of guilty plea judgments upon other issues than those constituting essential elements of the crime. As indicated, that precise question has not, so far as our research discloses, been authoritatively addressed by the Virginia courts.

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[5]Virginia's general rule against preclusion by criminal judgments is rested upon the mutuality requirement, *see Aetna Casualty & Surety Co. v. Czoka*, 200 Va. 385, 105 S.E.2d 868, 872 (1958), a requirement that the Supreme Court of Virginia has recently declined to abandon, at least in cases of attempted "offensive" use. *Norfolk & Western Railway Co. v. Bailey's Lumber Co.*, 221 Va. 638, 272 S.E.2d 217 (1980) (citing *Aetna Casualty & Surety Co. v. Czoka* in support, but recognizing the *Heller* exception where defensive use was involved).

(2)

When we look to general principles of collateral estoppel, either as a guide to Virginia's likely view were the precise question presented to its highest court or as an independent source for the proper application of collateral estoppel doctrine to our issue,[6] the answer is again not definitively given.

It cannot be found with certainty in the recent *Restatement (Second) of Judgments* (1980), taking that as perhaps the best possible source for a responsible statement of "conventional doctrine" in this realm. This important secondary authority suggests that as a general proposition criminal judgments based upon guilty pleas can have no collateral estoppel effect as to *any* issues, because by definition none has been "actually litigated," *Restatement (Second) of Judgments* § 133, Comment *b* (1980), a fundamental predicate for issue preclusion in the Restatement's formulation, *see id.* § 68, Comment *e*. This general proposition is immediately hedged, however, by the concession that "[a] defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts *representing the elements of the*

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[6]See note 4 *supra*.

offense...not [as] a matter of issue preclusion...but [as] a matter of the law of evidence...," *Id.* § 133 Comment *b* [emphasis added].

This concession is forced by a significant number of decisions,[7] including several by other

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[7]These decisions have recently been collected in Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 & nn. 122-25 (1980); Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L. Rev. 464, 478-83 (1981) [hereinafter cited as *Modest Dissent*] in the course of that respected commentator's challenge to the *Second Restatement's* general position that an essential predicate for collateral estoppel is that the issues shall have been "actually litigated." The existence of these decisions is of course recognized in the *Second Restatement*, but their results, though conceded to be possibly "correct," are there ascribed to estoppel principles derived from the law of evidence rather than from traditional res judicata doctrine. *Id.* § 133, Comment *b*; Reporter's Note, Comments b and c. Many of the cases, however, clearly reveal an assumption that res judicata/collateral estoppel doctrine is being applied. Freed of any "mutuality" and "actually litigated" requirements, collateral estoppel doctrine would of course clearly apply, and Professor Vestal so explains the cases. *See* Vestal, *Modest Dissent*, *supra*, at 478-83. For our immediate purposes we have to assume that these decisions constitute elements in the body of "conventional" collateral estoppel doctrine to which *McCurry* requires our attention, notwithstanding the indications of a lack of scholarly consensus on the exact shape of that doctrine.

federal courts of appeals,[8] that have rather routinely found estoppel arising from guilty pleas notwithstanding the lack of actual litigation of the critical issues. With only a few exceptions,[9] these decisions finding preclusion in guilty pleas have concerned issues that represented elements of the crime charged. As to such "element-issues" it can with reason be said - and has been said in various ways - that though not actually litigated they have necessarily been judicially admitted by the plea, so that the criminal defendant is estopped to contest them in subsequent civil litigation. *See e.g., Brazzell v. Adams,* 493 F.2d 489, 490 (5th

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[8] *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) (§ 1983 action); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977) (diversity action); *Hernandez-Uribe v. United States,* 515 F.2d 20 (8th Cir. 1975) (criminal action); *Ivers v. United States,* 581 F.2d 1362 (9th Cir. 1978) (federal civil action). All these decisions applied preclusion to issues which represented essential elements of the crime to which a guilty plea had been entered.

[9] *See Metros v. United States District Court for District of Colorado,* 441 F.2d 313 (10th Cir. 1971) (false arrest; illegal search); *Hooper v. Guthrie,* 390 F.Supp. 1327 (W.D. Pa. 1975) (false arrest; false imprisonment); *Palma v. Powers,* 295 F.Supp. 924 (N.D. Ill. 1969) (§ 1983 action for illegal search and seizure) (result criticized in Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems,* 66 Cornell L. Rev. 564, 581-84 (1981) [hereinafter cited as *Revisiting*], in the course of that author's response, as Reporter for the *Second Restatement,* to Professor Vestal's critique).

Cir. 1974); *Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). If this then be conventional - or at least plainly emerging - doctrine respecting element-issue preclusion by guilty plea, the question remains whether it should apply as well to non-element issues, specifically, for our purposes, to the potential but unlitigated issue whether specific evidence of the crime should be suppressed on fourth amendment grounds.

(3)

Assuming, without deciding, that a state judgment based on a guilty plea should ordinarily[10] have preclusive effect in a later § 1983 action as to all issues representing essential elements of the crime, we do not think it should have preclusive effect as to potential but not actually litigated issues respecting the exclusion of evidence on fourth amendment grounds. There is a critical distinction, grounded in fundamental policies respecting the proper application of collateral estoppel, between the two types of issues.

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[10]Subject of course to the possible application of various "qualifications and exceptions" that within conventional doctrine may make collateral estoppel inappropriate in a particular case, including most fundamentally a lack of full and fair opportunity to litigate. *See McCurry*, 449 U.S. at 95 & n.7.

It related to the assurance that there was adequate *incentive* in the criminal proceeding fully to litigate the issue sought to be precluded.

Whatever the difference among courts and commentators as to the "actually litigated" requirement for issue preclusion, there has been general agreement - to the point of convention - that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate "to the hilt" the issues in question.[11] *See generally Restatement (Second) of Judgments* § 68.1(e)(iii), Comment (1980). With respect to issues representing the very elements of the crime charged, the adequacy of incentive to contest may be thought manifest in relation to any guilty plea. But it is not necessarily manifest with respect to potential but

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[11]It is possible to analyze the basic point of difference between the *Second Restatement*'s position and that of Professor Vestal on guilty plea preclusions as going as much to how and by whom "adequate incentive" is to be shown as to whether the "actually litigated" requirement has general application in collateral estoppel doctrine. *See Hazard, Revisiting, supra* at 584. But there is no disagreement that adequate incentive is a critical component of collateral estoppel.

unlitigated issues related to the exclusion of evidence on fourth amendment grounds.[12] A moment's reflection shows why.

Despite the most egregious violation of fourth amendment rights, it is quite conceivable that a state criminal defendant has no real incentive to seek suppression of the resulting evidence because the state has so sufficient an amount of untainted evidence that making the effort would in the end be futile and possibly even harmful to the defendant's immediate interests. In that situation, while a guilty plea might be thought, despite the lack of actual litigation, to be properly preclusive of element-issues, we think it should not be preclusive of the search and seizure issue. On the other hand, there is always the possibility that in a particular case a guilty plea has been entered when the only available evidence on critical issues was search and seizure evidence. In that situation, there was obviously as

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[12] Lying perhaps between these two types of issues and presenting still different sets of considerations are issues that in the criminal actior represented not elements of the crime but of potential absolute affirmative defenses such as entrapment or stop-gap objections that had no evidence exclusion implications. On these we reserve decision, simply noting that each presents incentive-to-litigate problems that may differ in critical respects from those presented by evidence-suppression issues.

much incentive to litigate the suppression issue as any representing essential elements of the crime, and if preclusion is finally to turn on incentive, it should in that situation result as well for the evidentiary as for the element-issue.

This could of course be determined on a case by case basis, with the question whether the one situation or the other was present being addressed in the § 1983 action as one of fact incident to determining the collateral estoppel defense. *Cf. Restatement (Second) of Judgments* § 68, Comment *f* (1980) (extrinsic evidence to determine what issues litigated). Fair resolution of this factual question could be expected, however, frequently to be difficult. Relevant evidence would consist of such state court records of proceedings incident to the guilty plea as might be available and any extrinsic evidence bearing upon the scope of the state's evidence and the defendant's knowledge of it at the critical time. It is of course true that however sparse and ambiguous this evidence might be, the incentive question could and would nevertheless finally be resolved in every case, as are many other difficult issues, through the ultimately decisive leverage of proof burdens.[13] But while the question could always in

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[13]That the proper cast of this burden might itself present a difficult problem, *see Hazard,*

(footnote continued)

the end be resolved by the usual processes, many times fairly and occasionally even rather easily, we think that on balance the game is not worth the candle. The question is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases.

Such a rule, we think, is amply justified by those general policies which emphasize the need for judicial flexibility in accommodating conflicting values of finality, fairness, and public confidence in applications of res judicata. *See generally Restatement (Second) of Judgments*, Ch. 1, Introduction pp. 12-15 (1980); *id.* § 68.1. It is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments.[14] And it is compatible with our own prior decisions respecting the estoppel effect of state criminal judgments in § 1983 actions.[15]

(footnote continues)

Revising, supra at 584. The problem is not of course before us, but its existence may properly be taken into account as an added difficulty in resolving the incentive question on a case by case basis.

14 *See* Part III B (1).

15 *See* cases cited at note 3 *supra*. As there indicated, in all three of the cases, *Wiggins,*

(footnote continued)

The price exacted by such a flat rule of non-preclusion is the opportunity it affords state prisoners who pled guilty in state courts to litigate for the first time in § 1983 actions search and seizure issues that might have been but were

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(footnote continues)

Rimmer, and *Cramer*, in which we have given issue preclusive effect in § 1983 actions to state court judgments of conviction, the judgments were based upon adjudications of guilt after trial. None involved guilty pleas. Additionally, in both *Wiggins* and *Rimmer*, the issues precluded had been "fully litigated" and determined adversely to the § 1983 plaintiff in the state criminal action. This further distinguishes those decisions in a critical respect. In *Cramer*, the precluded issue had not been fully litigated in the state criminal action where it was potentially an evidence suppression issue. *Cramer* is therefore the case in the trilogy most like the instant case in those respects critical to application of collateral estoppel doctrine: there, as here, the issue was not an element-issue, and it was not fully litigated. But it differs in yet another critical respect which justified preclusion there but makes it inappropriate here. In *Cramer*, it was manifest from the record that the evidence used to convict in the state criminal prosecution was that obtained by the search and seizure which formed the basis for the § 1983 action. This made equally manifest the § 1983 plaintiff's "adequate incentive" to seek its suppression in the state action. It is precisely because the guilty plea obscures what was manifest in *Cramer* that we hold here against preclusion.

not raised[16] in state criminal actions. Given the obvious disincentive to forego meritorious suppression motions in the criminal action, *see McCurry*, 449 U.S. at 104 n.23, and the subsequent disincentive (however modest some may consider it) to advance frivolous search and seizure claims in the § 1983 action, we think the price not an exorbitant one in terms of judicial resources and the public interest even if there were no countervailing considerations. And there are of course such considerations. First, there is the avoidance by this means of any necessity to devote effort and resources in the § 1983 action to the resolution of a peripheral factual question of incentive that, as indicated, is likely to be difficult and frequently incapable of fair resolution in that collateral setting.

More important is the fact that since *Stone v. Powell*, 428 U.S. 465 (1976), the § 1983 federal

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[16]Still another variant on the narrow question we decide would be that presented by an unsuccessfully litigated suppression motion followed by a guilty plea. Whether that situation should be thought controlled by our "fully litigated" decisions, or by this one, or be treated as presenting still different collateral estoppel problems, we need not here decide. *See, e.g., Restatement (Second) of Judgments* § 41, Comment *g* (1980) (finality for issue preclusion purposes); *id.* § 68.1(a), Comment *a* (effect of inability to obtain appellate review).

forum is the only one available for assertion of this particular constitutional claim. Though the Supreme Court has specifically rejected this as a sufficient reason for blanket disallowance of collateral estoppel in § 1983 actions involving fourth amendment claims, *McCurry*, 449 U.S. at 102-05, it remains a legitimate reason - well within "conventional doctrine" - for systematically disallowing it in the narrow and concededly marginal circumstance for applying collateral estoppel that is created by guilty pleas. See generally *Restatement (Second) of Judgments* § 88, Comments *b* and *d* § 68.1(e), Comment *g* (1980); *see also Allen v. McCurry*, 449 U.S. at 115 (Blackmum, J., dissenting) (emphasizing different case of search and seizure issues in the two proceedings).

IV

For the reasons given in Part III, we reverse and remand for further proceedings consistent with this opinion that portion of the judgment of the district court which dismissed, on waiver and estoppel grounds, Prosise's search and seizure claim. For reasons given in Part II, that portion of the judgment dismissing Prosise's excessive force claim is affirmed.

AFFIRMED IN PART
REVERSED AND
REMANDED IN
PART

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

December 30, 1981

TO: Norman A. Townsend, Esq.
Sebastian K. D. Graber, Esq.
David R. Lasso, Esq.
Charles G. Flinn, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-6310 this date.

The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 19, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant; et al,

Appellees.

O R D E R

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is denied by an evenly divided court.

Entered at the direction of Judge Phillips for a panel consisting of Judge Winter, Judge Butzner, Judge Russell, Judge Widener, Judge Hall, Judge Murnaghan and Judge Chapman would have granted rehearing en banc.

For the Court

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed March 29, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of

certiorari to this court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6310

[Filed April 28, 1982]

JOHN FRANKLIN PROSISE,

Appellant,

versus

GILBERT A. HARING, Lieutenant;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHART, Detective;
THOMAS TRUMBLE, Officer; and
GARBER, Officer,

Appellees.

O R D E R

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional 30 days to and including, May 28, 1982, pending application of the appellees in the

Supreme Court of the United States for a writ of certiorari to this court.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK